

JUN 5 1963

JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1961

HALLIBURTON OIL WELL CEMENTING COMPANY,
Appellant,

v.

JAMES S. REILY, COLLECTOR OF REVENUE
STATE OF LOUISIANA (SINCE SUCCEEDED BY
ROBERT L. ROLAND, WHO WAS DULY SUCCEEDED
BY ROLAND COCREHAM),

Appellee.

**APPLICATION FOR REHEARING ON BEHALF
OF THE COLLECTOR OF REVENUE,
STATE OF LOUISIANA**

CHAPMAN L. SANFORD,

Attorney of Record upon whom
service may be made.

Room 403

Capitol Annex Building
Baton Rouge, Louisiana

No. 264

In the
Supreme Court of the United States

OCTOBER TERM, 1961

HALLIBURTON OIL WELL CEMENTING COMPANY,
Appellant,

v.

JAMES S. REILY, COLLECTOR OF REVENUE
STATE OF LOUISIANA (SINCE SUCCEEDED BY
ROBERT L. ROLAND, WHO WAS DULY SUCCEEDED
BY ROLAND COCREHAM),

Appellee.

**APPLICATION FOR REHEARING ON BEHALF
OF THE COLLECTOR OF REVENUE,
STATE OF LOUISIANA**

The petition of the Collector of Revenue of the State of Louisiana, defendant and appellee, in the above entitled and numbered cause respectfully represents that the judgment of this Honorable Court rendered herein on the 13th day of May, 1963, reversing the judgment of the Supreme Court of the State of Louisiana, is erroneous and contrary to law and is prejudicial to the State of Louisiana for the following reasons:

1.

Even if it were to be conceded that the opinion

of the Court would be correct under facts showing different treatment of in-state and out of state manufactures of items to be used, not sold, there are no such facts in the record of this case.

2.

Neither the facts in the stipulation of the parties nor the allegations of the petition establish a cause of action or justiciable controversy with regard to the question of discrimination against interstate commerce because the arguments are based upon conjecture.

3.

There is no showing that Halliburton has, in fact, suffered discrimination. There is neither a plea nor evidence that another taxpayer is being favored.

4.

The decision in this case violates the long established policy of this Court not to test a statute's constitutionality in the abstract, nor to render a declaratory judgment when a controversy based upon real and actual facts does not exist.¹

1. The Court has refused to determine the constitutionality of abstract questions in numerous cases. An excellent presentation in a closely analogous case is contained in *Ashwander vs. Tennessee Valley Authority*, (1936) 297 U.S. 288, 56 S. Ct. 466, wherein this Court pointed out:

"The Scope of the Issue. We agree with the Circuit

The petition of Halliburton alleges only a hypothetical situation upon which the plea of discrimination against interstate commerce is based². No fact-

2. Allegation XI of the petition states in part :

"As to each of the aforesaid three phases of this case, the taxpayer alleges—inter alia—that the Use Tax, if interpreted and applied as the Collector would interpret and apply it here would cast upon the taxpayer (petitioner) a burden more onerous than that *which would be levied by the Louisiana Sales and Use Tax had the transactions involved occurred in Louisiana.*" (Emphasis supplied)

Allegation IXV in the last sentence also indicates only a hypothetical situation :

"In sum, the tax burden would fall upon persons who conduct such shop operations outside Louisiana, and then cross the state line in Louisiana, but such tax burden *would not fall upon persons who conduct identical operations just inside the Louisiana interstate border line.*" (Emphasis supplied)

Court of Appeals that the question to be determined is limited to the validity of the contract of January 4, 1934. The pronouncements, policies, and program of the Tennessee Valley Authority and its directors, their motives and desires, did not give rise to a justiciable controversy save as they had fruition in action of a definite and concrete character constituting an actual or threatened interference with the rights of the persons complaining. The judicial power does not extend to the determination of abstract questions. *Muskrat v. United States*, 219 U.S. 346, 361, 31 S.Ct. 250, 55 L.Ed. 246; *Liberty Warehouse Company v. Grannis*, 273 U.S. 70, 74, 47 S.Ct. 282, 71 L.Ed. 541; *Willing v. Chicago Audi-*

torium Ass'n, 277 U.S. 274, 289, 48 S.Ct. 507, 72 L.Ed. 880; *Nashville, Chattanooga & St. Louis R. Co. v. Wallace*, 288 U.S. 249, 262, 264, 53 S. Ct. 345, 77 L. Ed. 730, 87 A.L.R. 1191. It was for this reason that the Court dismissed the bill of the state of New Jersey which sought to obtain a judicial declaration that in certain features the Federal Water Power Act exceeded the authority of the Congress and encroached upon that of the state. *New Jersey v. Sargent*, 269 U.S. 328, 46 S.Ct. 122, 70 L.Ed. 289. For the same reason, the state of New York, in her suit against the state of Illinois, failed in her effort to obtain a decision of abstract questions as to the possible effect of the diversion of water from Lake Michigan upon hypothetical water power developments in the indefinite future. *New York v. Illinois*, 274 U.S. 488, 47 S.Ct. 661, 71 L.Ed. 1164. At the last term the Court held, in dismissing the bill of the United States against the state of West Virginia, that general allegations that the state challenged the claim of the United States that the rivers in question were navigable, and asserted a right superior to that of the United States to license their use for power production, raised an issue 'too vague and ill-defined to admit of judicial determination.' *United States v. State of West Virginia*, 295 U.S. 463, 474, 55 S.Ct. 789, 79 L.Ed. 1546. Claims based merely upon 'assumed potential invasions' of rights are not enough to warrant judicial intervention. *Arizona v. California*, 283 U.S. 423, 462, 51 S.Ct. 522, 75 L.Ed 1154.

The Act of June 14, 1934, providing for declaratory judgments, does not attempt to change the essential requisites for the exercise of judicial power. By its terms, it applies to 'cases of actual controversy,' a phrase which must be taken to connote a controversy of a justiciable nature, thus excluding an advisory decree upon a hypothetical state of facts. See *Nashville, Chattanooga & St. Louis R. Co. v. Wallace*, *supra*. While plaintiffs, as stockholders, might insist that the board of directors should take appropriate legal measures to extricate the corporation from particular transactions and agreements alleged to be invalid, plaintiffs had no

right to demand that the directors should start a litigation to obtain a general declaration of the unconstitutionality of the Tennessee Valley Authority Act in all its bearings or a decision of abstract questions as to the right of the Authority and of the Alabama Power Company in possible contingencies." (297 U.S. 288, 324; 56 S.Ct. 466, 472)

A statement applying the principle regarding declaratory judgments is contained in *Angell vs. Schram*, (1940) 109 F 2d 380, Sixth Circuit, wherein the Court explained the rationale of the Declaratory Judgments Act:

"The rationale of the act contemplated a declaration in respect of a cause of action residing in the parties, which means a legal demand of one's right with judicial relief.

"It is not essential to the jurisdiction of the court under the act that some wrong is immediately threatened but the mere surmise that some right or claim may be asserted does not confer jurisdiction. The seeds of a controversy must sprout before the court may take notice.

"The plaintiff must establish facts which give rise as a matter of law to an existing or imminent invasion of his rights by the defendant which would result in injury to him. This rule is fundamental and in order to maintain an action, the injury must flow directly from, and be the probable and natural result of, the wrong of which plaintiff complains. This concept excludes all remote and incidental matters and is confined solely to the determination of controversies, actual or contemplated, between the parties. *Aetna Life Insurance Company v. Haworth*, 300 U.S. 227, 241, 57 S.Ct. 461, 81 L.Ed. 617, 108 A.L.R. 1000."

(Emphasis Supplied, 109 F 2d 380, 381)

The court saw fit to state further:

"The court lacks the power to declare rights in any case where a decision under it would not terminate the uncertainty or controversy which gave rise to the action or where the declaration under all circumstances is not necessary or proper at the time." (109 F 2d 380, 382)

ual discrimination is pleaded. It is factual, of course, that the Collector has included shop overhead and labor in computing the tax basis for Halliburton's trucks, but the stipulation that the Collector *would not* include shop overhead and labor in the cost basis if they produced trucks in Louisiana is merely a suggested application under a hypothetical set of facts, and not binding on the Collector.

6.

There is no evidence in this record that the Collector actually discriminated against Halliburton nor that he favors any local taxpayer. The evidence shows only a hypothetical situation.

7.

To allow the judgment to stand will settle nothing. The facts of this case do not call for a judicial

3. This is Section III of the stipulation quoted by the Court on page 3 of the opinion. It is the last paragraph of Section III of the stipulation:

"If petitioner had purchased its materials, operated its shops, and incurred its Labor and Shop Overhead expenses at a location within the State of Louisiana, *there would* have been a sales tax due to the State of Louisiana upon the cost of the materials purchased in Louisiana and a Use Tax on materials purchased outside of Louisiana; but *there would* have been no Louisiana sales tax or use tax due upon the Labor and Shop Overhead."
(Emphasis supplied)

The court has made this section of the stipulation the very basis of its decision.

interpretation of the Louisiana tax statute. The facts do not even call for a judicial pronouncement upon what the Collector is doing. The facts only call for a pronouncement upon what the Collector "*would*" do "if" Surely parties may not by stipulation create a justiciable issue if none in fact exists.

8.

The judgment leaves the entire matter as to the meaning and application of the Louisiana statute as to local manufacture-consumers in a state of flux. While the Collector must now concede that his suggested application was not legal, the language of the statute does not require such an application. There

4. The pertinent provisions are contained in Title 47 of the Louisiana Revised Statutes:

"* * * * *

§ 301 (4) "Dealer" includes every person who manufactures or produces tangible personal property for sale at retail, for use, or consumption, or distribution or for storage to be used or consumed in this state.

"Dealer" is further defined to mean:

"(a) every person, who imports, or caused to be imported, tangible personal property from any state or foreign country for sale at retail, for use, or consumption, or distribution, or for storage to be used or consumed in this state;

"(b) every person who sells at retail, or who offers for sale at retail, or who has in his possession for sale at retail, or for use, or consumption, or distribution, or storage to be used or consumed in this state, tangible

is no evidence of an application of the law as suggested in the stipulation, not even in an isolated instance. The Collector of Revenue immediately will be right back in Court with this same taxpayer and will, properly, be unwilling to suggest how he will apply the statute until met with a particular factual situation demanding a ruling.

9.

The complainant has failed to make a case with regard to the question of discrimination against interstate commerce insofar as the shop overhead and

personal property as defined herein:

"(c) Any person who has sold at retail, or used, or consumed, or distributed, or stored for use or consumption in this state, tangible personal property and who cannot prove that the tax levied by this Chapter has been paid on the sale at retail, the use, the consumption, the distribution, or the storage of said tangible personal property;

* * * *

§ 301 (15) "'Storage' means and includes any keeping or retention in this state of tangible personal property for use or consumption in this state, or for any purpose other than for sale at retail in the regular course of business."

* * * *

§ 301 (18) "'Use' means and includes the exercise of any right or power over tangible personal property incident to the ownership thereof, except that it shall not include the sale at retail of that property in the regular course of business."

§ 301 (19) "'Use tax' includes the use, the con-

labor phase is concerned because he has failed to show that the tax statute itself is discriminatory and has failed to show a discriminatory application. Indeed, complainant has failed even to plead *facts* sufficient to establish a justiciable controversy with regard to the question of discrimination against interstate commerce insofar as the shop overhead and labor phase is concerned.

10.

This Honorable Court has erred in distinguish-

sumption, the distribution and the storage, as herein defined."

§ 302 A "There is hereby levied a tax upon the sale at retail, the use, the consumption, the distribution, and the storage for use or consumption in this state, of each item or article of tangible personal property, as defined herein, the levy of said tax to be as follows:

"* * * *

"(2) At the rate of two percentum (2%) of the cost price of each item or article of tangible personal property when the same is not sold but is used, consumed, distributed, or stored for use or consumption in this state; provided there shall be no duplication of the tax."

§ 305 "The 'use tax', as defined herein, shall not apply to livestock and livestock products, to poultry and poultry products, to farm, range and agricultural products when produced by the farmer and used by him and members of his family." (This intimates a use tax on all other products produced for use in the state.)

These sections apparently contemplate an application of the use tax to all tangible personal property not subjected to a sales tax—whether or not such property has been imported.

ing the incidence of the sales tax and the use tax because the incidence of both is identical.

The Court has failed to realize that neither the sales tax nor the use tax distinguishes between in-state and out-of-state taxpayers. Both the sales tax and the use tax apply to the *first taking for use* in Louisiana by the consumer. The consumer, no matter who he is, is the taxpayer in the case of each tax.

Louisiana Legislative competence does not extend beyond its borders. Legislative competence does not apply until commerce is at an end. Certainly, after property comes within its jurisdiction Louisiana can tax the first use in all cases—whether by virtue of the sales tax or use tax.

If the incidence of tax is identical, if the rate of tax is identical, if the measure—fair market value—is the same in all cases, how can there be discrimination? Even if the facts were presented sufficiently to demand the Court's expression the result reached must be incorrect. The reasons contained in the dissenting opinion are clear and logical. Therefore, if the Court feels that a justiciable controversy exists, then the Collector of Revenue of the State of Louisiana, for the reasons expressed in the dissent respectfully requests a rehearing.

11.

Because the sales tax law *specifically* provides

that used or second-hand merchandise shall bear the sales tax,⁵ the Court is further in error when it suggests on Page 9 of the opinion that the Louisiana law favors the local second-hand market.

12.

The Court in considering the statement by the Louisiana Supreme Court that "the exemption of an isolated sale from the provisions of the sales tax applies strictly to sales within the State of Louisiana; it has no effect whatsoever on any transaction without the State."⁶ failed to understand the connotation and purpose of the statement. The Supreme Court of Louisiana was not "baldy" admitting disparate treatment but was expressing the lack of legislative competence or jurisdiction beyond the boundries of Louisiana. The Louisiana Supreme Court understood the importance time and place in the exaction of the tax. In considering *place* Louisiana may not impose a sales tax on sales outside Louisiana—it has no legislative competence to do so. How can it be expected then that the Louisiana Legislature could exempt a sale in another state from tax when it never had jurisdiction to

5. RS. 47:305 provides in part:

"In interpreting this provision, the term 'new article' means the original stock in trade of the dealer and shall not be limited to newly manufactured articles. The original stock or article, *whether it be a used article or not*, shall be subject to the tax." (Emphasis supplied)

6. Commented upon on page 9 of the opinion of this Court.

tax it in the first place. In point of time Louisiana must decide when the tax it seeks to impose shall apply. We have already seen that it cannot apply until Louisiana has jurisdiction of the *place*—i.e. it must be in Louisiana. Louisiana in deciding when the tax must be paid chose *the first possession by the consumer*. This is the most logical time, of course, because it is definite and easily ascertained by the mark of the retail sale. When the item is not sold but is used it is again the *first possession by the consumer* (within the jurisdiction) that is marked by the property being taken out of commerce with the view of being used in Louisiana.

13.

Louisiana exacts a sales tax when a second-hand item is sold at retail—why can it not tax an equivalent use in Louisiana when the property is subject to its jurisdiction?

Wherefore, the Collector of Revenue of the State of Louisiana prays that a rehearing be granted in this cause and that after due proceedings the judgment rendered herein on the 13th day of May, 1963, be set aside and that the appeal of Halliburton Oil Well Cementing Company be dismissed.

CHAPMAN L. SANFORD,
Attorney for the Collector of
Revenue, State of Louisiana.
Room 403
Capitol Annex Building
Baton Rouge, Louisiana

CERTIFICATE

I, Chapman L. Sanford, attorney for the Collector of Revenue of the State of Louisiana, certify that the foregoing petition for rehearing is presented in good faith and not for the purpose of delay.

Baton Rouge, Louisiana, this 4th day of June,
1963.

CHAPMAN L. SANFORD
Attorney for the
Collector of Revenue

PROOF OF SERVICE

I, Chapman L. Sanford, attorney for the Collector of Revenue of the State of Louisiana, Appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the fourth day of June, 1963, I served a copy of the foregoing *Application for Re-Hearing*, upon the following named persons, by mailing—postage prepaid—copies to each of them at their offices at the respective addresses set out opposite the name of each, viz.,

- (1) Benjamin B. Taylor
Taylor, Porter, Brooks, Fuller & Phillips
Attorneys for the Appellant
11th Floor, La. National Bank Building
Baton Rouge, Louisiana
- (2) Humble Oil and Refining Company, *Amicus Curiae*
c/o Forest M. Darrough, Attorney of Record
1216 Main Street
Houston, Texas
- (3) Chicago Bridge and Iron Company, *Amicus Curiae*
c/o Albert L. Hopkins, Attorney of Record
Hopkins, Sutter, Owen, Mulroy and Wentz,
Attorneys
One North LaSalle Street
Chicago, 2, Illinois
- (4) Sperry Rand Corporation, *Amicus Curiae*
c/o Cicero C. Sessions, Attorney of Record
Sessions, Fishman, Rosenson & Snellings,
Attorneys
1333 National Bank of Commerce Building
New Orleans 12, Louisiana

- (5) Thomas Jordan, Inc., *Amicus Curiae*
 c/o Charles D. Marshall, Attorney of Record
 Milling, Saal, Saunders, Benson and
 Woodward
 1122 Whitney Building
 New Orleans 12, Louisiana
- (6) American Can Company, *Amicus Curiae*
 c/o Ben R. Miller, Attorney of Record
 Sanders, Miller Downing, Rubin and Kean
 P. O. Box 1588
 Baton Rouge, Louisiana
- (7) Rosson Richards Processing Company, *Amicus Curiae*
 c/o Robert E. Leake, Jr.
 1207 Whitney Bldg.
 New Orleans 12, Louisiana
- (8) Wate-Kote Company, Ltd., *Amicus Curiae*
 c/o Robert E. Leake, Jr.
 1207 Whitney Bldg.
 New Orleans 12, Louisiana

CHAPMAN L. SANFORD
 Attorney of Record for
 the Collector of Revenue
 State of Louisiana, *Appellee*

Baton Rouge, Louisiana
 June 4, 1963